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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1308

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, a/k/a INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD L. CAREY,
HARRISON COMBS,
WILLARD P. OWENS,
CHARLES L. WIDMAN,
WALTER E. GILLCRIST,
900 Fifteenth Street, N. W.
Washington, D. C. 20005
Counsel for Petitioner

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INDEX

Table of Contents

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	14
Appendix A	1a

Table of Cases

E. J. Albrecht Co. v. New Amsterdam Casualty Co., 163 F.2d 16 (7th Cir., 1947)	12
First National Co. v. C.I.R., 289 F.2d 861 (6th Cir., 1961)	12
Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753 (2d Cir., 1967)	12
National Labor Relations Board v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967)	14
Utah Public Service Comm'n. v. El Paso Natural Gas Co., 395 U.S. 464 (1969)	12

Statutes

Landrum-Griffin Act:	
29 U.S.C. §§ 401-531	2
29 U.S.C. § 411(a)(1)	3, 6
11 D.C. Code § 521 (1967 ed.)	9
28 U.S.C. §§ 1254(1) and 2101(c)	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on August 17, 1970.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia appears in Appendix A hereto, *infra*, page 1a, and is reported in 298 F. Supp. 1262. The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in Appendix B hereto, *infra*, page 10a, and is reported in —— U.S. App. D.C. ——, —— F.2d ——. An amendment to the opinion of the court of appeals appears in Appendix C hereto, *infra*, page 32a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered August 17, 1970 (A. 10a, R. 3).[1] A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 6, 1970 (R. 6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where an affiliated labor organization, legitimately controlled by another labor organization, incurs a debt to that labor organization, did the subsequent enactment of the Landrum-Griffin Act, 29 U.S.C. §§ 401-531, requiring a change in the relationship between the two labor organizations, which when met, impose additional fiduciary duties on the creditor labor organization to the extent that it must assure the debtor of a reasonable balance of bargaining position prior to the debtor's execution of an enforceable promissory note?

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[1] The abbreviation "A. —" refers to pages in the appendices to this petition. The abbreviation "R. —" refers to the certified record filed in this cause.

2. Did the Landrum-Griffin Act, directly or by implication, impose a fiduciary duty on the creditor labor organization to insist that the debtor labor organization, after it had become a separate, independent entity through the adoption of a constitution and the election of officers in accordance with the Landrum-Griffin Act, have independent advice of counsel prior to execution of a promissory note in its favor?

3. Did the Landrum-Griffin Act, directly or by implication, impose a fiduciary duty on the creditor labor organization, in resolving a previous indebtedness through the execution of a promissory note, of assuring the debtor of continued viability as a prerequisite to enforceability in an action at law of the promissory note?

4. In fashioning new concepts of fiduciary obligations, allegedly imposed on labor organizations as a result of relationships wrought from enactment of the Landrum-Griffin Act, did the court of appeals, in an action on a promissory note, err in reversing the judgment of the trial court and directing judgment to be entered for respondent, rather than award a new trial, where, not having notice of such new concepts, evidence was not adduced by either party on these issues?

STATUTORY PROVISIONS

The statutory provisions involved are the Act of September 14, 1959, Title I, § 101(a)(1), 73 Stat. 522, popularly known as the Landrum-Griffin Act, 29 U.S.C. § 411(a)(1):

> *Bill of rights; constitution and bylaws of labor organizations*
>
> (a)(1) *Equal rights.*—Every member of a labor organization shall have equal rights and privileges

within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

STATEMENT OF THE CASE

Judge Alexander Holtzoff of the United States District Court for the District of Columbia, in an action for the balance due on a promissory note, entered judgment in favor of petitioner in the amount of eight million six hundred fou dollars and twenty-seven cents ($8,000,604.27). Rejecting District 50's defenses of fraud, duress, and lack of consideration, the district court found, "not an iota or scintilla of evidence was introduced even remotely tending to show any fraud, deceit or misrepresentation or any physical, moral or business duress or pressure" (A. 2a).

The United States Court of Appeals for the District of Columbia Circuit reversed the judgment and remanded the cause with directions to enter judgment for respondent. The circuit court held that the issues involved were controlled, ". . . not so much by historic common law doctrines and concepts, as by the adjustment wrought in pertinent legal relationships by national labor relationships" (A. 21a). Its ruling was predicated not on common law concepts as such, ". . . but on the conclusion that the fiduciary obligation of the UMW was significantly extended for the circumstances before us by the policy of the Landrum-Griffin Act" (A. 27a). In holding the promissory note unenforceable, the circuit court concluded that petitioner had failed to meet the fiduciary standards ex-

tended by the policy of the Landrum-Griffin Act in failing to insist that the debtor have independent assistance of counsel in negotiations leading to the execution of the note.

Secondarily, the court, analogizing from the field of antitrust law, concluded that the debtor's emergence as an international labor union, when saddled with the size of the promissory note, rendered it less than viable.

The factual background which precipitated these extraordinary legal findings commenced almost thirty-five years ago.

A small group of gas, coal, coke, and chemical workers, organized into five federal unions, solicited affiliation with the United Mine Workers of America in September of 1936 (R. 486, 485, 515).[2]

On February 21, 1961, in compliance with the Landrum-Griffin Act, District 50 held a constitutional convention, the delegates having been elected by secret ballot (R. 769, 775, 776). They adopted a constitution and elected international officers, including the members of an Executive Board (R. 769). They authorized and empowered their international officers to proceed to work out mutually acceptable articles of affiliation with the United Mine Workers of America (A. 798).[3]

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[2] The charter of affiliation provided that District 50 would acquire no rights in the funds, or participate in the elections or conventions of the United Mine Workers of America (R. 766, 767).

[3] In October, 1960, petitioner's International Executive Board had tendered affiliation upon mutually acceptable terms, including the continued use of the name "District 50, United Mine Workers of America," upon completion of District 50's constitutional convention (Petitioner's Exh. 29). As subsequent negotiations fully demonstrate, one of the "mutually acceptable terms" included provisions relating to the payment of the indebtedness.

Between 1936 and 1961 District 50 grew. Its membership increased. Its covered industries expanded. It became national in scope. It collected dues from its membership, a portion of which was retained by District 50 and the remainder remitted to its local unions (R. 635, 636, 646, 647). It paid the United Mine Workers of America an affiliation fee or per capita tax, permitting it among other things to utilize what its officers recognized to be a valuable name (R. 489). During this period District 50 paid petitioner approximately fourteen million dollars ($14,000,000).

During this same period District 50's relationship to petitioner was denominated by both the District and Circuit Courts as one of vassalage. Its officers were appointed by petitioner. Personnel were loaned to District 50. Yet the only evidence adduced on this point showed that these men were working for the sole benefit of District 50, even though they received their salary from petitioner (R. 489, 517, 518).

During these formative years petitioner actually loaned twenty-three million dollars plus in cash to District 50. Both creditor and debtor recognized that these cash transmittals were loans (R. 828).

Passage of § 101 (a)(1) of the Landrum-Griffin Act, 29 U.S.C. § 411 (a)(1) (1959) required District 50 to make changes. The Court of Appeals stated that there were two choices. Either the membership of District 50 could be assimilated into the United Mine Workers of America with equal rights and privileges, or District 50, through the adoption of a constitution and the election of officers could become a separate, distinct, independent union. The Act itself posed no barrier to either procedure (A. 22a). The Court held

that this "fission" could be achieved only if there was some reasonable balance of bargaining position, sufficient to give enduring vitality to any agreement reached, as if it had been negotiated by an independent union (A. 23a).[4]

Upon enactment of the Landrum-Griffin Act, the executive officers of petitioner and respondent met in conference with their respective legal departments (R. 495, 496). All aspects of the law as well as proposed regulations were discussed (R. 495, 496). The only evidence offered on this point demonstrated that all parties mutually agreed that District 50 should call a convention, adopt a constitution and elect its officers (R. 495, 496). The convention endorsed and ratified this approach.

The Court of Appeals applied its reasonable balance of bargaining position to events occurring twelve months after District 50 had achieved independent status. During that period respondent initiated negotiations, both as to the amount of its debt, affiliation, and use of the trade name. Agreement in principle was reached in the fall of 1961 on February 26, 1962, following negotiations, the promissory note was executed (R. 700). On April 10, 1962 the action of District 50's officers was ratified and approved by the District Executive Board (R. 730).

The negotiations resulted in District 50 being given credit for every penny it had ever paid to the United

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[4] Although the Court of Appeals uses the term, "fission," District 50 was never an integral part of petitioner. It was affiliated both before and after the promissory note in question was executed. The pertinent point is that the promissory note and other agreements were executed by officers of District 50 elected by delegates from its own membership who themselves had been chosen by secret ballot.

Mine Workers of America (R. 742). Instead of a debt of twenty-three million dollars, the note was executed only for the difference between the amount loaned District 50 and the amount District 50 had paid to petitioner (R. 742). The promissory note was interest free (R. 700).

The District Court found not a scintilla of evidence to support fraud, deceit, misrepresentation or business duress (A. 2a). The Circuit Court imposed additional standards on petitioner. These standards, admittedly not found in the common law, were derived by the Court from the policy of the Landrum-Griffin Act. Reasonable balance of bargaining position required that the United Mine Workers of America insist that District 50 have advice of independent counsel (A. 19a, 25a).[5] The need for such advice is predicated solely on the fact that the officers of District 50 and their legal department had been formerly appointed by petitioner. But this ignores the fact that District 50's officers had in the meantime been duly elected by delegates assembled in convention, who themselves had been elected by their membership through secret ballot. It also ignores the fact that the same officers have continued to represent District 50 even to the present. Alfred Treherne, Esquire, a member of the Legal Department of District 50 at that time, appears of record in this cause, representing District 50.

Payments under the promissory note and affiliation agreement commenced March 1, 1962 (R. 693, 700). Payments for affiliation and use of the trade name continued until 1968 when the agreement was terminated

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[5] This is merely one of several issues on which neither party to the litigation has had an opportunity to offer evidence.

(R. 765). Payments on the note were made through August, 1964, except for a moratorium of nine months. On March 25, 1966, District 50 repudiated the promissory note, but affirmed the payment of fees for affiliation and use of the trade name (R. 614, 615, 744).

In the spring of 1968, petitioner instituted an action at law against respondent, for the balance due on the promissory note, invoking the jurisdiction of the United States District Court for the District of Columbia, both parties maintaining their principal place of business and being found within the District of Columbia, and the amount in controversy, exclusive of costs and interest, exceeding the sum of ten thousand dollars, pursuant to 11 D.C. Code § 521 (1967 ed.).

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning fiduciary duties which may be implied from a policy of national labor legislation. At issue is the enforceability of the amount due on a promissory note involving approximately eight million dollars. Approximately four hundred thousand individuals representing the combined membership of the two international labor organizations which are parties hereto have a vital stake in the outcome of this litigation.

The United States Court of Appeals for the District of Columbia Circuit has, by its decision, imposed fiduciary duties on labor organizations which are at this time not applicable to the remainder of the citizenry. The predicate for the imposition of such duties is allegedly the policy of the Landrum-Griffin Act.

All international labor organizations in the United States have a vital interest in this case. As a result

of the decision of the Court of Appeals, any agreement entered into between an international labor organization and any of its local unions or other subordinate entities, including affiliates, must be preceded by negotiations which meet the reasonable balance of bargaining position test imposed by the Court. In meeting such test, the Court has impliedly construed the policy of the Landrum-Griffin Act to include the fiduciary duties of independent advice of counsel and assurance of viability to the subordinate labor organization. By its decision, the Court of Appeals has placed an onerous burden upon all international labor organizations in their day-to-day agreements with subordinate labor organizations. No matter how autonomous a subordinate labor organization may be, it will be argued that the superior labor organization exercises some form of control over the subordinate. We respectfully submit that these newly created fiduciary duties cannot be inferred from the policy of the Landrum-Griffin Act.

The court of appeals has fashioned a reasonable balance of bargaining position test under which it will scrutinize agreements between labor organizations, formerly affiliated and/or controlled by the other. The fiduciary duties which the Court has impliedly carved out of national labor legislation are unreasonable.

The Circuit Court did not apply the reasonable balance of bargaining position test to the actual "fission" which allegedly occurred between these two labor organizations. The only evidence tendered clearly disclose that the "fission," which the Court denominated a permissible procedure under the Landrum-Griffin Act, occurred through the mutual consent of the officers of both labor organizations in conference with their respective legal departments. This mutuality of con-

sent was subsequently ratified by a proper constitutional convention of respondent.

District 50, having adopted a constitution and elected officers, became a separate, independent entity, fully divorced from petitioner. Affiliation between these two independent labor organizations was tendered by petitioner upon mutually agreeable terms. These terms included a resolution of the past indebtedness. Such resolution was effected eleven months after independence. It is at this juncture that the Court of Appeals applies its reasonable balance of bargaining position test.

In applying the test, the Court first looks at the period of "vassalage" when the indebtedness was initially incurred. Absent any evidence demonstrating that the monies loaned were used for any other purpose than the benefit of District 50, the Court substitutes its own judgment for that of the creditor. It questions the use of such monies for the expansion of organizing the unorganized. The Circuit Court then examines the issue whether, during negotiations, the creditor labor organization was under a fiduciary duty to insist that the debtor have independent advice of counsel. In footnote four of its opinion, it is noted that District 50 initially had the opportunity of independent advice of counsel, but, prior to any consideration of the case, counsel's services were terminated. Although fully aware that District 50 had its own legal department, the Circuit Court determined that advice emanating from that department would not be independent. The sole predicate for this supposition is that the attorneys therein were hired during the alleged period of "vassalage." It is ironic indeed to note that the officers of District 50 who signed and approved the promissory note and one

of the two attorneys in their Legal Department some ten years later still represent respondent labor organization.

The insistence upon the need for such independent advice of counsel is determined to be a fiduciary duty imposed upon the creditor organization by the policy of national labor legislation. Every day the courts in this country enforce promissory notes entered into by laymen without independent advice of counsel as long as no fraud, deceit, misrepresentation, lack of consideration, or business duress is present. Nor does the Court consider the continued acknowledgment of the existence of the debt by District 50 in subsequent years. Repudiation of the debt did not occur until March of 1966, yet the issue of waiver is not considered. *Hellenic Lines, Ltd.* v. *Louis Dreyfus Corp.*, 372 F.2d 753, 785 (2d Cir., 1967); *E. J. Albrecht Co.* v. *New Amsterdam Casualty Co.*, 163 F.2d 16, 19 (7th Cir., 1947). Furthermore, the Circuit Court failed to consider whether the transaction was merely voidable and ratification had erased any taint of impropriety. *First National Co.* v. *C.I.R.*, 289 F.2d 861, 867 (6th Cir., 1961). Applying the reasonable balance of bargaining position test to the execution of the promissory note, the Court of Appeals considered the viability of District 50. By analogy, it compared the situation to agreements of divestiture in the antitrust area necessary to obviate an unlawful merger. *Utah Public Service Comm'n.* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969). The Court found that the fiduciary duty of assuring viability to District 50 had been breached by the mere imposition of an eight-million-dollar debt. No cognizance was taken of the special assessment levied by District 50 on its membership in January

of 1963 for the primary purpose of facilitating the payment of this indebtedness. No consideration is given to the fact that only seventeen percent of the total amount collected under this special assessment was in fact used for the primary purpose intended.

No matter how the negotiations were conducted, and no matter what advice was available, the undisputed facts demonstrate that petitioner credited respondent with every penny that it had paid to the United Mine Workers of America since its inception. Having been given full credit for affiliation dues or per capita taxes, the note was then made interest free. Although it contained a default clause, no attempt was made to declare the balance due and owing until several years had passed, clearly evidencing the refusal of District 50 to pay.

Congress, by enacting the Landrum-Griffin Act, sought to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs, and procedural due process to members subjected to discipline. *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 194 (1967). Congress never intended the Landrum-Griffin Act to create fiduciary duties which would compel a labor organization to insist that another labor organization have independent advice of counsel before execution of a promissory note, even within the context of this case. Nor did Congress ever intend to create a fiduciary duty compelling a labor organization to assure a former controlled affiliate of continued viability prior to the execution of any agreements between them. This Court, in the exercise of its supervisory capacity over the circuit courts of appeal, should

consider whether the policy of national labor legislation has impliedly created such fiduciary duties.

The United States Court of Appeals for the District of Columbia Circuit has, by its decision, imposed newly created fiduciary duties on petitioner. In reversing the judgment of the trial court, the Court of Appeals directed that judgment be entered for respondent. No opportunity has been afforded to petitioner to introduce germane evidence as to facts pertaining to these issues. It is respectfully suggested that, in fairness to the combined membership of both labor organizations, the Circuit Court of Appeals should have entered directions to award a new trial rather than entry of judgment for respondent.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in the instant cause.

Respectfully submitted,

EDWARD L. CAREY,
HARRISON COMBS,
WILLARD P. OWENS,
CHARLES L. WIDMAN,
WALTER E. GILLCRIST,
900 Fifteenth Street, N. W.
Washington, D. C. 20005
Counsel for Petitioner

February 4, 1971

APPENDIX

APPENDIX A

[Filed May 19, 1969]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil No. 748-68 and No. 1238-68

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,
Plaintiff,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, a/k/a
INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE
WORKERS OF AMERICA, ET AL., *Defendants*.

Opinion

Edward L. Carey, Willard P. Owens and Walter E. Gillcrist, all of Washington, D. C., for the plaintiff.

Joseph C. Wells, Jack H. Weiner and Alfred D. Treherne, all of Washington, D. C. for the defendants.

This is a joint trial of two actions that were consolidated for that purpose. In each action the plaintiff is International Union, United Mine Workers of America. It is a nationwide labor organization of coal miners, subdivided into numerous local unions, organized along geographical lines in regions in which coal mining is carried on. The defendant in each action is District 50, an organization of persons employed in gas, coke, and chemical industries, which for many years was allied with the plaintiff, and which is likewise subdivided into local units.

The first action is a simple suit on a promissory note, which originally was made for $8,440,000 in round figures. The balance claimed to be due on that note is $8,000,664.27. The second action is brought to enjoin the defendant from using the words "United Mine Workers of America" as

part of its title, in view of the fact that the plaintiff has terminated the affiliation agreement between the two organizations. The affiliation agreement contained a provision giving either party the privilege of terminating it on 30 days' notice, which undeniably the plaintiff has given. Although on their face the two actions seem to be entirely separate and distinct, actually some of the issues in the two actions are intertwined and much of the evidence is applicable to both. Hence, it seemed in the interest of efficiency and of preventing a good deal of duplication that the two actions be consolidated for trial.

We shall take up first the action on the promissory note given by the defendant to the plaintiff on February 26, 1962, on which some payments have been made, leaving the balance due as has just been stated. Execution of the note and failure to pay the balance due are not denied. The defenses interposed are fraud, duress, lack of consideration and an understanding that the note was a paper transaction and that it was not intended that the note should be actually enforced and paid. The first three of these defenses completely collapsed at the trial. Not an iota or scintilla of evidence was introduced even remotely tending to show any fraud, deceit or misrepresentation, or any physical, moral or business duress or pressure.

What capped the climax as to these defenses was the testimony given on cross-examination by Angelo Cefalo, the Vice President of District 50, the defendant in these actions. He was one of the three executive officers who signed the note on its behalf. He gave the following answers on cross-examination (page 423 of the transcript):

> Q. At the time you executed the Articles of Affiliation, the financial agreement and the promissory note on February 26, 1962, did you do this voluntarily or were you coerced into affixing your signature?
>
> A. I did it voluntarily.
>
> Q. Were you fraudulently persuaded to sign any of these three agreements on that specific date?
>
> A. No, sir.

Q. Were you subjected to duress, coercion or restraint at the time you affixed your signature on these three documents?

A. No, sir.

Q. At the time you signed the documents on February 26, you had occasion to read or have these documents read to you, is that correct?

A. I so testified.

As to the claim of lack of consideration, the evidence showed that the note was executed as the result of a compromise and settlement of a long standing obligation or indebtedness, that was reached as a result of negotiations. In order to understand the last contention, namely, that it was not intended that there was a real indebtedness between the parties or that the note was to be actually paid, it is necessary to review some of the antecedent events that led to its execution.

United Mine Workers, the plaintiff in these two actions, was created in 1890 and eventually became the dominant labor organization in the coal mining industry. In 1936 a large unorganized amorphous group of gas, coke and chemical workers desired to create a union and to become allied with the United Mine Workers. Their leaders informally approached the United Mine Workers and were welcomed. John L. Lewis, who was then the President of the United Mine Workers, apparently felt that it would strengthen the position of his organization in the labor world to have as an ally a group of workers in occupations that were on the fringe of the coal mining industry. He annexed the group to his cohorts. It was organized and chartered under the arbitrary name of "District 50, United Mine Workers of America." It had no experienced personnel at the beginning, it had but few facilities, and it possessed very little money. John L. Lewis appointed the officials of the new organization, lent personnel to it to conduct its operations and to expand its activities and caused the United Mine Workers to advance funds to it from time to time.

The sums advanced were very small at the beginning but increased in size as time went on, until on occasion they amounted to several hundred thousand dollars or more at a time. Each request for an advance was personally passed upon by John L. Lewis. These advances made it possible for the new organization to exist, to operate and to grow. The advances, however, were not intended as gifts but were deemed to be loans. In each instance Mr. Lewis in approving an advance expressly designated it as a loan and the defendant likewise denominated every advance as a loan. These advances were carried on the books of both organizations as loans and later were listed in the defendant's reports as loans when it filed official reports with the Department of Labor under recent amendments to the Labor Management Act. The plaintiff union imposed an obligation on the defendant to pay 50 cents per month per member as the price of the alliance and the privilege of using the plaintiff's name. The defendant's financial resources were insufficient to keep up these payments and to meet operating expenses as well. On many occasions the defendant borrowed funds from the plaintiff not only for operating expenses, but also for the purpose of paying the assessment it owed to the plaintiff. Thus we see an astounding and fantastic method of financing by which the debtor borrowed money from his creditor in order to pay his debt to the creditor.

The plaintiff was very careful not to make the defendant an integral part of its organization. Thus, District 50 had no vote in the United Mine Workers and sent no delegates to its conventions. It was a vassal rather than a member of the plaintiff and was governed by the plaintiff in an autocratic method. It had no elections of its own and its members had no participation in its government and affairs. This situation continued from 1936 to 1961.

By 1961 the aggregate amount of advances from the United Mine Workers to District 50 reached the vast sum of about $23,000,000. On the other hand, the assessments

paid by the defendant to the plaintiff totaled about $14,000,000. It will be remembered as heretofore stated that in large part these assessments were paid by the defendant to the plaintiff out of money that the defendant had borrowed from the plaintiff. Over the years the vassal had grown in membership, strength and prestige and possibly had become somewhat restive under the domination of the United Mine Workers. At about that time, too, a statute was enacted by the Congress known as the Landrum-Griffin Act, which introduced democracy into labor unions on a mandatory basis. It required all unions to conduct periodic elections of officers and further enacted from them the obligation to file formal annual reports of their finances with the Department of Labor.

The heavy monetary obligation of the defendant to the plaintiff troubled the defendant's officers. They entered into negotiations with the plaintiff's officers, and were successful in obtaining a very favorable settlement. The plaintiff's officers agreed to give to the defendant credit on the note for the total amount of assessments that had been paid by the defendant to the plaintiff. By this compromise the debt of over $23,000,000 was reduced to a little over $8,000,000.

During the same period there were also negotiations concerning the exact status of the defendant and its precise relation to the plaintiff. An understanding was reached on all of these matters and was formulated in three documents executed on February 26, 1962, by the respective officers of both organizations. They were ratified by the defendant's Executive Board in April 1962.

The first document is known as Articles of Affiliation between International Union, United Mine Workers of America, and District 50, United Mine Workers of America. It provides in Paragraph II that each party recognizes the other as a separate, distinct and independent labor organization. In Paragraph III it was stated that these Articles of Affiliation constitute and evidence full settlement, satisfaction and release of any and all claims or demands of

First Party upon or in, the properties and assets of Second Party and further constitute and evidence full settlement, satisfaction and release of all rights, claims, interests or demands of Second Party in and upon the assets and properties of First Party. In other words, the parties were exchanging general releases. It further provided in Paragraph IV that in consideration of the right to use the name "District 50, United Mine Workers of America", the defendant was to pay the sum of ten cents per member per month. Paragraph VI contained the following important provision:

> These Articles of Affiliation shall be effective as of March 1, 1962, subject to termination by either party by the giving of at least thirty days' written notice to the other party of such desired termination date, it being fully understood and agreed that all rights, privileges and obligations herein granted or created by this agreement (except the continuing obligation of Second Party to fully pay and liquidate any outstanding indebtedness due by it to First Party) shall cease and be of no further force and effect from and after said termination date.

The next document that was executed on February 26, 1962, is an agreement that has been called throughout the trial as a financial agreement between the two parties. It was stipulated that the total amount advanced and loaned by the International Union to District 50 equalled the aggregate sum of $23,171,966.88, and that during the same period of time District 50 had paid to the International Union the total aggregate sum of $14,372,566.81. It was further agreed that there remained due from the defendant to the plaintiff the sum of $8,799,400.07. It was agreed that the last mentioned amount should be represented by a note to be given by the defendant to the plaintiff. The note was not to bear interest and was to be paid in monthly installments at the rate of forty cents per member per month.

The third document executed simultaneously with the first two was a promissory note running from the defendant to the plaintiff for the sum of $8,799,400.07 payable as just stated and bearing no interest. The note contained a provision that if default be made in the payment of any monthly installment, the principal should at the election of the holder at once become due and payable.

When the documents were executed one of the defendant's officers expressed a doubt as to defendant's ability to make the payment of forty cents per member per month regularly. The President of the plaintiff union, Thomas Kennedy, replied that if any difficulty arose the defendant might request some relief. In fact, later the officers of the defendant union requested of the plaintiff a moratorium of several months. They continued payments on the note until sometime in 1964. They listed the note as an obligation in their annual reports to the Secretary of Labor. It is clear, therefore, that the defendant right along recognized the note as constituting a valid and binding obligation.

A statement made by Mr. Lewis after he had retired and had become President Emeritus was introduced in evidence in an effort to show that the indebtedness was a mere paper debt, not intended to be repaid. As heretofore indicated, Mr. Lewis contemporaneously treated each advance as a loan and expressly designated it as such. Were there any inconsistency between them, the contemporaneous statements made by him while he was active president should be preferred over a statement made years later after he had retired. Actually, however, it is far from clear that there is any inconsistency. The later statement is merely a recommendation that leniency be extended to the defendant and is not an unequivocal expression that the debt did not exist. In fact, the purport of the statement was advice to continue advances to the defendant. Mr. Lewis' successors, however, declined to follow that recommendation.

The conclusion is inescapable that the note constitutes a valid obligation of the defendant to the plaintiff. The two

organizations with the growth of District 50 were rapidly coming to a parting of the ways. A cleavage, among other things, arose in the philosophy of the two groups. The defendant announced an espousal of nuclear energy. The plaintiff deemed this position as being inimical to the coal industry. Other differences arose, as well as some personality clashes. The defendant, starting as the protege of the plaintiff, was asserting its independence. On March 25, 1966 the defendant's Executive Board adopted a formal resolution repudiating the note. It had ceased making any payments two years previously.

As previously stated, the Court reaches the conclusion that the promissory note, which is the subject matter of one of the two actions is a binding obligation of the defendant to the plaintiff. Judgment will be entered in favor of the plaintiff against the defendant for the balance due on the note amounting to $8,000,664.27.

In its counterclaim the defendant seeks an accounting of assets belonging to it which it claims to have come into the possession of the plaintiff. This counterclaim is not sustained by the evidence. There is no evidence that any assets belonging to the defendant came into the plaintiff's possession and consequently the counterclaim will be dismissed.

The second action is brought for an injunction against the use by District 50 of the words "United Mine Workers" in its title. It will be recalled that the affiliation agreement of February 26, 1962, contained a termination clause empowering either party to terminate the agreement upon 30 days' notice. On March 6, 1968, the plaintiff passed a resolution directing its officers to give written notice to the defendant of a termination of the affiliation agreement. This termination became effective April 6, 1968.

It is claimed by counsel for the defendant that the severance of this relation is invalid. Counsel seeks to invoke the principle that a union may not expel a component local

unit except on charges and after a fair hearing. This principle no doubt exists. but it is not applicable to the instant case. The defendant is not a member or a component unit of the plaintiff union. The two unions are independent bodies. They are equals allied by an affiliation agreement. This relation is emphasized by the provisions of Paragraph II of the Articles of Affiliation to which reference has already been made. Paragraph II reads as follows:

> "Each party hereto recognizes the other as a separate, distinct and independent labor organization, each international in scope, each party in behalf of its own separate membership operating under and in accordance with the terms and provisions of its own Constitution, functioning and conducting its affairs separately, individually and apart each from the other through its own respective officers and administrative subdivisions."

This agreement is signed by three officers of each of the two groups and in addition to that by the members of the Executive Board of District 50.

The affiliation agreement contained a termination clause. The Court perceives no invalidity in that clause in view of the relation between the two groups. Plaintiff validly exercised its termination privilege. The alliance is at an end. The defendant may no longer use the name "United Mine Workers of America" and a permanent injunction against the defendant's use of these words in its title will be granted.

The transcript of this decision will constitute the findings of fact and conclusions of law.

Counsel will submit appropriate judgments.

/s/ Alexander Holtzoff
United States District Judge.

May 19, 1969.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,127
No. 23,128

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, A/K/A
INTERNATIONAL UNION OF DISTRICT 50,
UNITED MINE WORKERS OF AMERICA, APPELLANT

No. 23,129

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, A/K/A
INTERNATIONAL UNION OF DISTRICT 50,
UNITED MINE WORKERS OF AMERICA, ET AL., APPELLANTS

Appeals from the United States District Court
for the District of Columbia

[Judgment entered this date]

Decided August 17, 1970

Mr. Joseph C. Wells, with whom *Messrs. Jack H. Weiner* and *Alfred D. Treherne* were on the brief, for appellants.

Mr. Walter E. Gillerist, with whom *Messrs. Edward L. Carey, Harrison Combs, Willard P. Owens* and *Miss Suzanne V. Richards*, were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, WRIGHT and LEVENTHAL, *Circuit Judges*.

LEVENTHAL, *Circuit Judge:* This litigation began with what seems on the surface a traditional action on a promis-

sory note, differing from other such actions, perhaps, in the size of the note—$8,000,000—and in the fact that both obligor and payee on the note when executed, in 1962, were labor unions identified with the United Mine Workers of America. The plaintiff payee is the International Union, United Mine Workers of America, which will be referred to variously as United Mine Workers, and UMW. The defendant obligor, District 50 of the United Mine Workers, offered the defense that the note is unenforceable because of the circumstances which led to its execution.

At the same time the note was executed, the parties signed an affiliation agreement which contained a licensing provision whereby District 50 was allowed to continue using the words "United Mine Workers of America" as part of its name. In 1968 the UMW exercised its rights under the termination clause permitting either party to terminate the agreement on thirty days' notice. District 50 continued to use the words "United Mine Workers of America" in its title. When plaintiff sued on the note it also filed an action for an injunction against the use by District 50 of the Mine Workers name. District 50 counterclaimed with a demand for an accounting for all of the funds which the United Mine Workers had received from District 50 since its establishment.

The District Court rejected the defenses of fraud and coercion raised by District 50, granted judgment to plaintiff United Mine Workers on the note and on its request for an injunction, and dismissed District 50's counterclaim. This case is moot as to the injunction since after taking the appeal District 50 started using another name.[1] In our view the District Court failed to take proper account of the circumstances surrounding the execution of the note and the name-licensing affiliation agreement. We reverse the judg-

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[1] "The International Union of District 50, Allied and Technical Workers of the United States and Canada."

ment on the note and order the action dismissed. We affirm the District Court's judgment dismissing District 50's counterclaim.

I

The roots of the present controversy extend back to the 1930's. In 1935 the United Mine Workers Union was a member of the AFL, and the UMW charter restricted membership to persons "employed in and around coal mines, coal washeries and coke ovens on the American Continent." In late 1935, John L. Lewis, President of the UMW, resigned from his position as Vice President of the AFL, the UMW withdrew from the AFL, and shortly thereafter the UMW constitution was amended to extend membership not only to those previously eligible, but also persons "in such other industries as may be designated and approved by the International Executive Board." The general purpose of this move was stated as protecting the UMW from "raids" by AFL unions and other unions which might be established in coal-related areas and which might seek to expand membership into the coal-mining area itself.

Accordingly, in September 1936, the UMW chartered District 50, and established its membership as including, for example, gas and chemical workers. However, District 50 was formed as a "provisional" district, and was subject to the jurisdiction of the UMW. Its charter provided that it was to "acquire no rights in the funds, or to participate in the elections or conventions of the United Mine Workers of America." Instead, District 50 was to have its "own autonomy with respect to . . . elections, conventions and wage negotiations." District 50 and its members were required to pay dues to the parent UMW. The officers of District 50, including Kathryn Lewis as Secretary-Treasurer, were appointed and paid by the United Mine Workers.

From the time of its inception, District 50 received funds from the parent UMW for organizational and other pur-

poses. The transfers were always designated as "loans." The dues assessed against members of District 50 were lower than those assessed against regular UMW members, chiefly because it was desired to make District 50 membership as attractive as possible to those persons who were eligible to join either District 50 or rival AFL unions. There was no significant rival-union threat to the remainder of the UMW.

In 1941, the administrative officers of Provisional District 50 were placed in charge of an Organizing Committee representing the UMW. This followed a report by John L. Lewis to the UMW Executive Board, advising that District 50 had an organization of substantial proportions, built at "nominal" cost beyond the fact that per capita tax "has been substantially plowed back into organizational purposes." He called for an expansion of organization. The Organizing Committee pressed organization vigorously and in diverse fields. In 1942, the United Construction Workers was accepted into District 50 membership as an affiliate. District 50 organized a Dairy Farmers Division, in 1942, and a Railroad Workers Division, in 1942-1943.

In 1944, the UMW officers reported to the UMW Convention on these facts, and placed them in a setting, beginning in 1942, wherein District 50 and UMW were in conflict with a dual union sponsored by the CIO. "In face of active opposition, not only from employers, labor organizations, government bureaus and officials of the administration, of high and low degree, apparently intended to undermine and destroy the International Union [UMW] through an attack which was centered on District 50, it has continued to make substantial progress." That progress was reported by noting that District 50 bargaining contracts covered more than 200,000 members, in diverse industries, and that stress was being placed on the chemical industry "of special importance in the post-war adjustment . . . because of its direct relation to the coal industry. It is of importance to

every coal miner in the country to do his part in furthering organization in this industry for his own interests as well as for the interests of the organization."

During the 1940's the expenditures of District 50 reached huge dimensions. So also did the checks transmitted by UMW to District 50, all carefully denominated as "loans" in the accompanying correspondence. The exact details are not clear but the sums loaned apparently emerged in the first half of the decade in the range of $1,000,000 per annum. During the first half of 1946, UMW's loans to District 50 totaled $650,000. The pace quickened during the last half of 1946, a period when UMW made loans to District 50 totaling $950,000, as contrasted with loans to all other UMW Districts combined of only $19,200.

Typically, a little over one third of the monthly loan was returned to the UMW in payment of District 50's per capita tax. The remainder was devoted in very large part to organization efforts. The officers and Organizing Committee of District 50 reported to their Fifth Consecutive Convention in September 1946 that "There is no thought of accumulating a treasury while millions seek assistance in organization. Indeed, District 50 has continued annual expenditures substantially in excess of receipts. This has been made possible by assistance from the International Union."

It is incontrovertible that the UMW sponsored and considered itself benefited by the policy of vigorous organizational activities by District 50. At a January 1947 meeting of the UMW International Executive Committee, President John Lewis recommended creation of a new Organizing Committee, as an intermediate agency, to "exercise supervisory jurisdiction over it [District 50] and decide those questions that come up every day as a matter of routine." Mr. Lewis stated that District 50 was a valuable asset, since it includes the "expanding" chemical industry, while employment in the mining industry will continue to drop with mechanization. He said that he thought it essential "from

the standpoint of our organization through the years to come . . . to continue expanding our membership from these collateral industries." He went on to state:

> Under these circumstances I think it is essential to keep District No. 50, which is now our largest district in America, as an expanding unit of our organization. District 50 . . . now could, if the organization so decided, maintain themselves as self-supporting districts in the organization. However, that policy would of course curtail, restrict and minimize the organizing activities and prevent the expansion as at [sic] rapid a rate as we would like. So, as long as we are able to do so, I think it well to continue these units as expanding entities taking in new members . . . .
>
> . . .
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> However, the operation of District 50 costs a substantial sum of money, and like all organizations, it needs a strict and meticulous attention upon the part of administrative officers of the organization.

A. D. Lewis, brother of John L. Lewis and "Special Representative of the United Mine Workers of America" became Chairman of the new Organizing Committee. The remaining five members of the new Organizing Committee were presidents of other districts of the UMW, and one was a member of the UMW International Executive Board. A. D. Lewis, who later became president of District 50, had his salary paid by the UMW until his death in 1962, shortly after the first affiliation agreement between District 50 and the UMW was concluded.

The new Organizing Committee continued the massive organizational and spending policies of District 50, though it was able to trim down the monthly subsidy from the UMW, from $150,000 to $100,000 per month.

Meanwhile the status of District 50 with respect to the UMW maintained its character of "vassalage," as the Dis-

trict Court referred to it. Indeed, on September 21, 1948, when O. B. Allen, appointed Comptroller of District 50 by John L. Lewis on April 22, 1948, reported to A. D. Lewis that the total loan from the International was $9,579,250.00 on July 31, 1948, he added, "This figure was secured from the UMWA as I could not determine a similar figure from District 50's records."

The same general pattern of loans continued through the 1950's. So also did the state of "vassalage." In 1955 A. D. Lewis, who by this time had been appointed president of District 50 following dissolution of the Organizing Committee, and who had, under the Rules of District 50 "general and complete supervision over, and administration of the affairs of the District," wrote to the man who was then general counsel for District 50: "You are aware, as I am, that District 50 lives, breathes and conducts its affairs as an integral part of the UMWA. It is necessary for us to make financial reports, each month, and follow the stated policies of the UMW at any and all times in conducting our business." Elwood Moffett, later President of District 50 when the 1962 affiliation agreement was signed, stated at the 1959 meeting of the UMW Executive Board that "District 50 is an instrument of the International Union," and added that "we take our advice and instructions from the Officers of the International Executive Board. We always have and we always will."

By 1961 District 50's loans from the UMW had run up to a total of approximately $23,000,000. During the period of its borrowings District 50 had paid to the UMW approximately $14,000,000 in dues. The District Court aptly termed this "an astounding and fantastic method of financing by which the debtor borrowed money from his creditor in order to pay his debt to the creditor."

Meanwhile, events were taking place in Congress which were to require an end to the special relationship that existed between District 50 and the United Mine Workers.

Investigations by the McClellan Committee [2] had revealed serious dishonesty and wrongdoing on the part of some labor leaders. Spurred by a strong national concern for reform, Congress undertook closer regulation of labor unions. One of the chief tools chosen to combat exploitation of union members by dishonest leaders was a federally mandated union democracy. The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 40-531 (1964), popularly called the Landrum-Griffin Act, contained a Labor "Bill of Rights," which extended federal protection to a group of rights which had previously enjoyed only state protection or none at all. Salient was the guarantee to each member of an equal right to vote and participate in elections, referendums, and meetings, subject only to the restrictions contained in reasonable union regulations.[3]

At this time District 50 had almost twice as many members as the rest of the UMW combined. Accordingly, the UMW decided against implementation of the Landrum-Griffin Act by extending full voting rights in the UMW to members of District 50. Instead it decided that District 50 was to become an independent international union. However, it was contemplated that District 50 would be affiliated with the UMW. In 1961 a set of Articles of Affiliation was approved by A. D. Lewis and the Executive Board of

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[2] *Hearings Before the Senate Select Comm. on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. (1957). These *Hearings* were followed by the *Hearings on Union Financial and Administrative Practices Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 85th Cong., 2d Sess. (1958), chaired by Senator John Kennedy.

[3] Section 101(a)(1) of the Act, 29 U.S.C. § 411(a)(1) (1964):

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

District 50 (which had been appointed by the President of the UMW) and by the International Executive Board of the UMW. It acknowledged an indebtedness on the part of District 50 running to the UMW without specifying the amount, and it stated that District 50 would "make every effort to repay this indebtedness to the satisfaction of the United Mine Workers of America . . . ." The Articles authorized District 50 to use the name, "District 50 Affiliated with the United Mine Workers of America."

After the adoption of these Articles, District 50 continued to pay a per capita "tax" to the UMW of 50 cents per member per month until District 50's treasury was reduced to $500,000, at which time it borrowed $500,000 from the UMW. This 1961 loan was made by the UMW upon the intercession of John L. Lewis, who had retired a few years before but took occasion to review with the officials of the UMW then in office the special considerations applicable to District 50, the organization which he had created and fostered as part of a wide-ranging UMW program.

During this period new discussion started between cognizant officers of the UMW and A. D. Lewis, as president of District 50 (though it merits reiteration that his salary was still being paid by the UMW). The purpose of these meetings was to negotiate new Articles of Affiliation and to make more precise the obligations of District 50 to pay back the loans. The two sides reached a general oral agreement during January of 1962. On January 24, 1962, prior to reduction of their agreement to writing, A. D. Lewis died. Elwood Moffett, then Vice President of District 50, succeeded automatically to the presidency. Moffett had not been a party to the negotiations between UMW officers and A. D. Lewis (there were strained relations between A. D. Lewis and Moffett), but he was approached not long after the death of A. D. Lewis with a draft agreement (including a note, a financial agreement, and the Articles of Affiliation) that had been prepared by the UMW's general counsel. The basic agreement provided that the $23,000,000 in loans was to be partially offset by the amount of dues that District 50

had paid the UMW between 1936 and December 31, 1961. The difference, approximately $8,000,000, was to constitute a debt from District 50 to the UMW. District 50 was to continue paying the UMW 50 cents per member per month; 40 cents of this figure was to go to retirement of the debt and 10 cents was to be an affiliation fee.

There was little if any negotiation over the terms of this agreement. The papers, including the $8,000,000 note, were executed on February 26, 1962, and all parties expressed themselves as satisfied with the results. District 50 was not at that time or during any of the negotiations represented by legal counsel.[4] On April 10, 1962, the Executive Board of District 50 unanimously approved the agreement.

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[4] Welly K. Hopkins, Esquire, then General Counsel for the UMW, arranged a meeting on January 19, 1962, with Edward L. Carey, Esquire, a lawyer then in private practice who had represented District 50 on matters unrelated to the Articles of Affiliation. It was contemplated that Carey would represent District 50 in the negotiations over the Articles and draw up a draft, but at the preliminary meeting Carey indicated that he had no knowledge of the background facts at that time, and that he would be better informed the following week after discussion with the officers of District 50. In the meanwhile he had another case to try. On February 1, 1962, Hopkins was informed that Carey no longer represented District 50. (UMW brief at pp. 26-27.) Mr. Carey's services were terminated by Edward Moffett, who took office as president upon the death of Mr. A. D. Lewis on January 24, 1962.

It is undisputed that District 50 was not represented in the matter at hand by Mr. Carey. The UMW brief states (p. 27):

> [P]laintiff's present counsel [Edward Carey] never represented District 50, or received any confidence from anyone concerning or related to the present litigation, or which pertained in any way to the articles of affiliation, the financial agreement, the trade name or the promissory note.

Mr. Hopkins noted at trial that District 50 had counsel on its staff, a Yelverton Cowherd and Alfred Treherne, its present general counsel. But they had been appointed during the period of vassalage. Mr. Hopkins testified that he did not know whether District 50 had any other counsel. We are assuming herein that Mr. Hopkins was correct in his recollection that he never advised

In late 1962 District 50 and the UMW approved a "moratorium" on the 40-cent portion of the per capita payments that represented debt retirement because of financial difficulties that District 50 was experiencing. In July of 1963 debt payments were resumed but at a lower rate. In August of 1964 they were terminated altogether. However, the 10-cent affiliation fee, which had been paid steadily since the signing of the agreement, continued to be paid until March 6, 1968. On that date the UMW exercised its option to cancel the affiliation agreement on 30 days' notice. The apparent motivation for this move was unrelated to the matters previously discussed, but was rather the displeasure of the UMW over a District 50 resolution favoring industrial use for atomic energy, a position contrary to the policy of the UMW.

II

While this action is on the surface a simple action on a promissory note, reflection on the background leading up to the signing of that note makes it clear that the issues in-

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District 50 or any of its officers or executives that it was not necessary to have outside counsel. Given the context of the matter before us, with the officers of District 50 executing what was represented to them to be an agreement negotiated during the period of vassalage, if the UMW and Mr. Hopkins wanted to avoid the problems now focused on by the court, they should have insisted that District 50 be represented by independent counsel in the negotiations, or at least have affirmatively advised District 50 of the desirability and importance of retaining independent counsel. Mr. Hopkins to some extent reflected this approach in his preliminary meeting with Mr. Carey, which he insisted be attended by others to avoid any speculation that he might have placed himself in a compromising position. (Def. Exh. 1.) But after the death of A. D. Lewis and succession of Elwood Moffett, he did not follow up on the need for independent counsel. A lawyer's professional responsibility to avoid giving advice to a person not represented by a lawyer, if there is a reasonable possibility of conflict with the interests of his client, is, of course, subject to the exception that he may give the advice to secure counsel. American Bar Association Code of Professional Responsibility (Disciplinary Rules) DR 7-104.

volved are controlled not so much by historic common law doctrines and concepts, as by the adjustment wrought in pertinent legal relationships by national labor legislation.

It was the Landrum-Griffin Act that brought about the legal necessity for changing the relationship between the UMW and District 50, and it was the Landrum-Griffin Act which dictated, in broad terms, the nature of the new relationship. Section 101(a) (1) of that Act, *supra* note 3, assures that "Every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws," 29 U.S.C. § 411(a) (1) (1964). This does not countenance the denial of voting rights to members of "provisional" districts whose officers and affairs are determined and dictated by the international union. After passage of the Act it was no longer permissible for the members of District 50 to continue as nonvoting, second-class members of the United Mine Workers. They had to become either full members of the UMW with equal rights and representation, or members of an independent labor organization not controlled by UMW.[5]

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[5] Professor Archibald Cox, who assisted closely in the preparation of the Landrum-Griffin legislation, has stated:

> Time and litigation will be required to determine what are "reasonable rules and regulations," but the basic distinction is not hard to illustrate. The division of members into voting and non-voting classes exemplified by the prior practice of the Operating Engineers is contrary to section 101(a).
>
> . . . The principle underlying section 101(a)(1) is that those who are bound, as members, by the union's decisions should have the opportunity to take part in the deliberations.

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 833-34 (1960).

We are not unaware of *Ragland* v. *United Mine Workers of America*, 188 F.Supp. 131 (N.D. Ala. 1960), which involved an

The United Mine Workers chose to give District 50 independence rather than "equal rights and privileges." The Landrum-Griffin Act poses no absolute barrier to such an

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attempt by members of District 50 locals to obtain a temporary injunction against the holding of the UMW International Constitutional Convention scheduled for October 1960 on the grounds that under the Landrum-Griffin Act the plaintiffs had the right to participate and vote but had not been invited to attend the convention. The District Court denied their request on three alternative grounds, one of which it stated in the following manner:

> This Court is further of the opinion that the "equal rights" provision of the Act was not intended by Congress to change the internal organizational structure of unions but granted rights and privileges to certain locals and members that were not conferred by the constitution and charter under which the unions and locals operate. It is the opinion of the Court that this Act was intended for use in those instances where "members" as opposed to "provisional members" are threatened with a deprivation of their rights that were previously afforded or granted to them under the unions' constitution and under their charter. In other words, the Act is designed to protect the right to vote and participate where that right exists and not for the purpose of conferring the right to vote and participate in cases where it has not previously existed or should have existed.

It may be, as that court indicated, that a kind of nonvoting "provisional" membership could be set up consistently with the provisions of the Landrum-Griffin Act—for example, such an arrangement would seem reasonable if it is desired to let retired persons retain their "membership." It is possible that "provisional" nonvoting membership in an international union might be acceptable if the provisional members who were associated with the international union in a loose-knit way were essentially independent, electing their own officers and controlling their own affairs. We cannot entirely agree with the Northern District of Alabama, however. We reiterate that the act does not contemplate denial of voting rights to members of "provisional" districts whose officers and affairs are determined and directed by the international union. **To avoid any misunderstanding, we expressly note that we are not to be taken as passing on the situation of independent locals or labor organizations, in which the rule of equality is respected, who voluntarily enter into or continue a status as an affiliate of a national or international labor organization.**

approach, but it makes demands of the process by which the fission is achieved. It is not enough that out of the bargaining process emerge two labor organizations, each of which extends equal rights and privileges to all of its members. That simple condition could be satisfied if one group ended up with all of a union's financial assets and the other with all its liabilities.

Where the members of a union will all continue to be members the act requires equality. The special question presented by this case is the proper relationship between the main union and the portion preparing for a separation intended by the parent union to avoid the statutory requirement of on-going equality. What is required for this is at least some reasonable balance (not necessarily complete equality) of bargaining position during preparation for reorganization, sufficient to give enduring vitality to the agreement as one reached by an independent union.[6]

This requirement is, if anything, stated more softly than the law might have required if applied strictly to the case at hand. For on a strict reading of the act, the UMW, having let a year go by since passage of the act, was required then and there to provide full equality to District 50 members in regard to referendums and to participation in membership meetings. 73 Stat. 535 (1959).[7]

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[6] The concept of reasonable balance between the parent union and the portion to be separated in entering into an agreement to establish the independence of the latter is derived from the overall implications of the Landrum-Griffin Act. It is not to be confused with the equality mandated for each of the members remaining in the on-going organization. The statutory equality for all members may mean more votes, and greater strength, for one division—here District 50—than another.

[7] We need not consider whether or to what extent any requirement on the part of the UMW would have been rendered inapplicable in the event of expulsion proceedings, since it is not asserted that either the procedure or the grounds were appropriate for expulsion of District 50.

There is a legal analogy in the separation agreements required in the antitrust field when one company must divest itself of another company to obviate an unlawful merger. Such a divestment must restore competition by establishing the disaffiliated company as a viable competitor, ready to survive in the marketplace. *Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969) In the present case, of course, there is not the same requirement to reestablish competition between the unions. (It may be noted that some element of conflict, not unrelated to the interest of competition, was inherent in the organization by District 50 of atomic energy workers in view of the ultimate competition between atomic energy and fossil fuels.) But the absence of an interest in direct competition between unions does not obliterate an underlying similarity between the two situations which make the principle of *El Paso* apposite.

In *El Paso* the acquiring company, through its acquisition, prevented the possibility of further natural, competitive growth on the part of the acquired company. Simple dissolution, without taking this weakness into account, would have launched the acquired company into the marketplace of the present equipped only with the survival tools of the past. Simply stated, control by the acquiring company prevented the normal development of the acquired company and crippled its ability to reenter the business world as a vigorous business entity.

In the case of District 50, the autocratic control of the UMW over District 50 had profound effect on the development of District 50. The dramatic expansion of District 50's membership was due in large part, if not primarily, to the proclaimed purposes of the UMW beginning with its purpose to protect itself against raiding with a buffer union. While expansion is in general likely to be welcomed by labor unions, that does not apply to forced-draft expansion at an inordinately expensive cost—expensive enough

to lead to transfers to District 50 of $23,000,000. The dominating union prevented the normal, independent financial development of the "acquired" union during their previous association. When the time came for independence, the imposition of even an $8,000,000 debt shackled District 50.

While businessmen may sometimes regard early losses in a new venture as capital investment in "good will," a debt of the magnitude of $8,000,000 overhanging a union about to be put on its own for the first time is hardly consistent with independent viability. At the very least this overhanging debt was a mortgage of dues for years to come—for even assuming the 40¢ per capita per month payment schedule and a roll of 200,000 members could have been maintained, more than eight years would have been required to pay the $8,000,000. In reality, payments had to be excused almost from the start.

Looking into another aspect of the dealings between the parties, we take note that the total domination of District 50 by the UMW prevented the normal development of District 50 not only financially but also in terms of preparations for independence. Officers of District 50 were imbued with the attitude expressed by Elwood Moffett in 1959: "[W]e take our advice and instructions from the officers of the [UMW] International Executive Board. We always have and we always will." Two years later, officers with such training were expected to represent the interests of District 50 against the UMW and its International Executive Board. They were appointees of the UMW's Board. The officers signing the agreement for District 50 were unrepresented by legal counsel while the UMW was fully represented by counsel at all times. They very probably had a significant legal position under the Landrum-Griffin Act to claim a right to participate in free UMW elections with the huge membership of District 50 if there was no disaffiliation of District 50 as an independent union in full compliance with the requirements of the act. Yet District

50's officers never raised this significant point, nor any other issue, and the "bargaining" consisted of simple acceptance of the terms drawn up by the Mine Workers' counsel.

Finally, it should be noted that the size of the debt contributes to a continuance of significant elements of the state of "vassalage" found by the district court to have existed before 1962. The present case illustrates the point well. District 50, having stopped payments on the note in 1964, became liable (assuming the note's validity) for the whole remaining amount on demand under the note's default clause. Yet it was not any financial default which triggered the demand for payment, and ultimately this lawsuit. The stimulus was District 50's public pronouncement in support of the domestic use of atomic energy, which was made on February 13, 1968.

Common-law precepts alone might well be invoked to support the conclusion that the UMW and its officers had a fiduciary obligation to protect the interests of District 50 as well as the interests of the UMW by assuring that District 50 was provided with the material information, available from the UMW, and that it had effective independent legal representation in order to insure that any agreement reached might endure as a free and untrammeled exercise of the rights of District 50 and its members. Such a fiduciary obligation had its roots in the recent vassalage of District 50, the fealty to the UMW and its officers which accounted for the positions in District 50 held by those signing the agreement, and the legal as well as practical problems involved in their readjustment of loyalty and responsibility to the members of District 50 as a distinct, separate and independent entity, all of these factors being significantly compounded by negotiations in which the officers of District 50 reached agreement with their recent masters without independent legal representation, although the matter was fairly beset by important legal considerations. It is in this context that a court must view the fact

that the officers of District 50 moved swiftly to sign the agreement and seemed to be guided primarily by feelings of gratitude and relief that the UMW had not pressed for the amount of $23,000,000 but had been willing to accept District 50's note of $8,000,000.

We are not to judge the situation by lesser standards that in former times might have been applicable when, purely as a matter of grace, a vassal was released from feudal obligations or a serf emancipated.

However, we place our ruling not on common-law concepts as such but on the conclusion that the fiduciary obligation of the UMW was significantly extended for the circumstances before us by the policy of the Landrum-Griffin Act. One significant expression of that policy is the requirement, embodied in § 105 of the act, 29 U.S.C. § 415 (1964), that labor organizations inform their members of the provisions of the statute. Congress was not content with creating rights *in vacuo* but insisted that union members be made aware of their rights so that they could exercise them intelligently.

Independent and knowledgeable representatives of each party would have taken into account that the uses of the UMW loans had particular benefit to the UMW, and to the objectives of that organization, particularly as envisaged in the grand design of John L. Lewis for a buffer union sent into battle first against the powerful AFL and later also against the CIO. It may be that the loans also benefited District 50 to some extent, but it would be hard to say to what extent they could be regarded as a realistic disbursement from the point of view of District 50 independently considered. With legal representation the officers of District 50 would have been informed of rights and positions available under Landrum-Griffin. One need not assume that they would have been rightfully entitled to use District 50's strength to "take over" the UMW. But a reasonable balance of bargaining position between the

parties would have included an awareness of their strengths as well as their weaknesses and would have helped insure that any disaffiliation agreement would be fair and ensure the viability of District 50 as an independent union.

It would ignore reality, even under the most indulgent reading of the facts, to conclude that the members of District 50 were afforded reasonable protection and balance of bargaining position with other members of the UMW. Such balance and protection were indispensable to assure the validity of negotiations and on-going agreements aimed at avoiding the primary goal of the Landrum-Griffin equality requirements.

By these standards the note and agreement are not enforceable as such, and the claim of the UMW must rest on some other branch of the law, such as unjust enrichment, a point we consider in part III.

III

Having determined that the note and agreement are not enforceable as such, because of the circumstances preceding and surrounding their execution, we are left with the question whether there are any obligations underlying the note which might still support a recovery for the plaintiff UMW.

Since it is impossible to return the parties to the conditions prevailing in 1961 to negotiate their relations anew, this time as equal and independent bargainers, the court, using its equity powers, must seek the best solution possible, recognizing the necessity of working with conditions as they are and not as we might wish to reconstruct them. This is the approach of equity courts in other difficult areas. For example, when wills contain imperfect charitable bequests, the court, under the *cy pres* doctrine, will comply with the testator's intent as nearly as possible when his exact instructions can no longer be honored.[8] Sim-

[8] *E.g.*, Briggs v. Merchants Natl. Bank, 323 Mass. 261, 81 N.E.2d 827 (1948).

ilarly, courts will not always order dissolution in antitrust cases involving illegal mergers. The court may consider that although the evidence is clear enough to warrant an injunction against future mergers, the circumstances are not sufficiently clear cut to warrant the drastic remedy of divestiture undoing past acquisitions.[9]

The particular difficulty that we face in this case is the disentanglement of financial transactions stretching across many years and supported by motives and expectations that were never entirely clear. The UMW would have us believe that the money denominated as "loans" by the parties was used chiefly for the benefit of District 50, and that retention by District 50 of the benefits derived and the money would constitute unjust enrichment. As our exposition of the relations between the parties demonstrates, that viewpoint is too simplistic and mechanical to be just. Most of the amount "loaned" to District 50 was used to finance expansion and recruitment or to pay District 50's per capita tax assessments to the UMW. District 50 might well have been able to pay all of its debts, including the per capita taxes, without the need for loans from the UMW if it had not engaged in the intensive expansion program that served the policies of the UMW, part buffer and part expansionist, devised by John L. Lewis. Mr. Lewis said as much to the UMW Board in 1946, stating that District 50 could be "self-supporting" but without the rapid expansion "we would like," and that expansion should continue "as long as we are able to do so." No doubt some benefit—chiefly in the form of increased membership—flowed to District 50 from these expenditures. But it is impossible to say that such a forced rate of expansion would either have been adopted by an independent District 50 or can now be justified, retrospectively, on quantum

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[9] *E.g.*, United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 566-67 (E.D. Pa. 1960), *affirmed per curiam*, 365 U.S. 567, *rehearing denied*, 365 U.S. 890 (1961).

meruit principles as prudent expenditures that yielded corresponding benefits to District 50. The motivation for the expansion and the expenditures it required came chiefly from the UMW, and expansion served UMW purposes as much as, and probably more than, it served the purposes of District 50. At this point in time we simply cannot apportion the benefits from the loans between District 50 and the UMW.

The UMW, serving its own purposes, has made resolution of which union benefited to what extent impossible to ascertain. It dominated and ran District 50 in such a manner and to such an extent as to tangle the affairs of the two unions beyond any practicable effort by a court at this time to sort, straighten out, and reconstitute. That being the case, we may find appropriate guidance in *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1964). In that case there was an antitrust violation which had both caused financial loss to the plaintiff and obscured the exact amount of the loss incurred. The Court warned that a verdict could not be based purely on speculation or guesswork, but nonetheless stated, "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which its own wrong has created." 327 U.S. at 265. The *Bigelow* case is not a perfect parallel since control of the UMW over District 50 was apparently not wrongful before the Landrum-Griffin Act became effective. But it is the case, as has been noted, that the UMW failed to take the full corrective measures following Landrum-Griffin which would have made a firm basis for a fair resolution that did not require court involvement.

Even when a person seeking restitution has not been guilty of tortuous conduct he cannot recover for services rendered or property transferred to a non-tortuous recipient on the basis of cost or loss incurred, but only on the basis of value to the recipient. Restatement of Restitution

§ 155. In this case the transfer did not yield benefit to District 50 equal to the dollars transferred because of the UMW expansionist expenditures that motivated and were implicit in the transfer. Since it was the UMW's activities that made it infeasible for a court to ascertain the value of benefit conferred or mold an appropriate order for relief, the UMW is disabled from seeking an equitable remedy.[10]

Finally, we have taken note of District 50's request for an accounting for the UMW. The District Court dismissed this claim for lack of evidence, and we find no reason to upset its conclusions in that respect.

The judgment of the District Court in favor of the United Mine Workers on the note is reversed and the cause remanded with directions to enter a judgment for the defendant. The judgment in favor of the UMW enjoining further use of its name is vacated as moot. The judgment dismissing the counterclaim of District 50 is affirmed. The parties will share equally the costs of the appeal.

So ordered.

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[10] It is settled doctrine that when parties are equally innocent equity permits the loss to be borne by the actor whose conduct has occasioned the loss. Am. Jur. Equity § 146 and cases cited.

APPENDIX C

Filed Oct. 21, 1970

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970.

Civil Action 748-68

Nos. 23,127 & 23,128

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, a/k/a INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Appellant*

No. 23,129

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, a/k/a INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, ET AL., *Appellants*

Before: LEVENTHAL, Circuit Judge, in Chambers.

Order

It is ORDERED, *sua sponte,* that the opinion of this Court filed herein on August 17, 1970, be amended as follows:

On page 4, line 7, change the words "pay dues" to "make payments" and add the following footnote as "1-a" after "UMW" on the same line. At the bottom of the page, the footnote will read:

> [1a] Technically the members of District 50 paid dues to District 50, and District 50 paid an affiliation fee, a per capita tax, to the United Mine Workers. There was no payment of dues to UMW direct by members of District 50.